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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 501

HUGHES TOOL COMPANY,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., and THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF FOR ADDITIONAL DEFENDANTS-RESPONDENTS IN OPPOSITION

This brief in opposition to the petition of Hughes Tool Company (Toolco) for a writ of certiorari is submitted on behalf of respondents The Equitable Life Assurance Society of the United States (Equitable), Metropolitan Life Insurance Company (Metropolitan), Irving Trust Company (Irving), Dillon, Read & Co. Inc. (Dillon Read), Ben-Fleming Sessel (Sessel), James F. Oates, Jr., Harry C. Hagerty and Charles C. Tillinghast, Jr. (collectively referred to herein as the additional defendants).

These respondents were named as additional defendants, pursuant to Fed. R. Civ. P. 13(h), in counterclaims filed by Toolco in an action brought against Toolco, Howard R. Hughes (Hughes), Toolco's sole stockholder, and Raymond M. Holliday (Holliday), Toolco's Executive Vice President, in the United States District Court for the Southern

District of New York by respondent, Trans World Airlines, Inc. (TWA).*

Opinions Below

Petitioner here seeks review of a judgment of the United States Court of Appeals for the Second Circuit which modified and, as modified, unanimously affirmed judgments of the United States District Court for the Southern District of New York (Metzner, J.), dismissing with prejudice five counterclaims asserted by Toolco against TWA and the additional defendants.

The judgments of the District Court were entered upon companion motions made by TWA and the additional defendants to dismiss Toolco's counterclaims for its "wilful and deliberate disobedience" (A-212)** of orders of that Court directing Toolco to produce two categories of specified documents for inspection and copying and to produce its managing agent, Hughes, for oral examination.

The companion motions were each based upon the same acts of disobedience and the violations of the same orders of the Court. The District Court, therefore, did not write a separate opinion with respect to each motion but merely filed a memorandum decision granting the motion of the additional defendants "for all of the reasons stated in the opinion and order entered on the companion motion by Trans World Airlines, Inc., for a default judgment and dismissal of the counterclaims with prejudice" (A-206). The District Court's opinion on TWA's motion is reported at 32 F. R. D. 604, and is reprinted as Appendix A to the petition herein.

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*Toolco also seeks, in No. 443, a writ of certiorari with respect to a judgment of the Court of Appeals affirming orders issued by the District Court with respect to the sufficiency of TWA's complaint.

**The record references used herein are the same as used by petitioner.

Among the findings of the District Court were the following:

1. "At the hearing counsel for Toolco stated that he had advised his client of the sanctions available to TWA under Rule 37, and that by insisting upon a right to obtain a review of the legal questions involved in the proceedings to date Toolco understood that it might be deprived of further defending on the merits. Counsel referred to this as a 'business decision.'"

2. "Counsel also stated that he did not intend to further litigate the counterclaims until after a determination of a complaint filed by Toolco with the Civil Aeronautics Board on February 6th which includes some of the allegations of the counterclaims."

3. "Embraced within the refusal to proceed with the deposition of Hughes is the refusal to obey the orders of the court directing Toolco to produce . . . documents. . . ."

4. ". . . It is clear that the deposition of Hughes is essential for the proper presentation of TWA's case. It is also clear that the failure of Hughes to appear on February 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts to postpone the appearance of Hughes had failed. The default was deliberate and willful and justifies the court in entering a default judgment as provided in Rule 37(b)(2)(iii) and 37(d)." (Pet. for Cert. App. A pp. 4a-5a)

Based upon the opinions and order of May 3, 1963, the District Court entered final judgments on May 28, 1963, dismissing with prejudice the first five counterclaims against TWA and the additional defendants (A-211, A-212—A-213).

The unanimous opinion of the Court of Appeals for the Second Circuit is reported at 332 F. 2d 602 and is reprinted as Appendix B to the petition herein. Of the five counterclaims involved, the Court of Appeals held that four stated claims clearly cognizable by the District Court and consequently, that Toolco was not entitled to a stay of proceedings on those counterclaims. It further held that the discovery orders of the District Court were proper, that the deposition of Hughes was "necessary to all aspects of this litigation" (Pet. for Cert. App. B p. 28a) and that "both TWA and the additional defendants had the right to depose Hughes" (*ibid.*). It also found that dismissal of these counterclaims with prejudice was "appropriate, in view of Hughes' intransigence" (*id.* at 29a). As to the second counterclaim, based on Section 408 of the Federal Aviation Act of 1954 (49 U. S. C. § 1378), the Court of Appeals held that the Civil Aeronautics Board (CAB) had exclusive jurisdiction and that this counterclaim should be dismissed for lack of jurisdiction.

Counterstatement of Questions Presented

The petition herein does not present any questions which are sufficiently special or important to warrant review by this Court. The only questions which are presented are as follows:

1. Whether due process or the accepted course of judicial procedure is violated by the dismissal with prejudice pursuant to Fed. R. Civ. P. 37 of a party's counterclaims for its deliberate and wilful refusal in defiance of court orders

(a) to produce its managing agent for oral examination;

(b) to produce two categories of documents, which might have significantly affected the entire controversy, for inspection and copying; and

(c) to make any further discovery.

2. Whether it is an abuse of discretion to deny a party's motion to stay its own counterclaims on the ground that the CAB had primary jurisdiction, when

(a) the moving party had conducted extensive discovery for a year;

(b) the motion was based on the absurd proposition that the moving party had itself initiated a CAB proceeding, the unsuccessful outcome of which might defeat its own counterclaims;

(c) the motion was designed solely to avoid discovery by the opposing parties; and

(d) the counterclaims were, with one exception, based on alleged violations of the antitrust laws and the common law, over which the CAB has no jurisdiction whatever.

Counterstatement of the Case

Toolco's Statement of the Case contains so many significant misstatements and omissions as to the record herein that we deem it appropriate to state in some detail what actually transpired below, as found by both the District Court and the Court of Appeals. When viewed in the context of this record, it will readily be apparent that the questions raised by Toolco's petition are patently without merit, and present no basis whatsoever for review by this Court.

On June 30, 1961, TWA commenced this action against Toolco, Hughes and Holliday, charging that the defendants, in the course of a conspiracy in violation of the antitrust

laws, had caused delays in the financing and acquisition by TWA of jet equipment, thereby inflicting upon TWA damages exceeding $35,000,000. Eight months later, in February, 1962, Toolco filed its answer and counterclaims bringing respondents into the action as additional defendants. In the intervening period several events occurred which bear on this petition.

By a series of orders commencing in August, 1961, Toolco obtained priority of discovery as against TWA (A-85, R-586). Toolco noticed depositions of TWA and of a large number of witnesses, including the respondents herein (R-76—R-87). The priority of those depositions as against TWA was confirmed on February 7, 1962 by a pre-trial order* of Judge Metzner, who had in late 1961 been assigned to the case for all purposes. That order also appointed Hon. J. Lee Rankin as Special Master to supervise the conduct of discovery proceedings (R-738).

Although the District Court had awarded Toolco priority as to oral depositions, it granted TWA's motion for production of documents by Toolco. Such production was to be made on March 15, 1962 (R-710). Thus at the time Toolco filed its counterclaims in mid-February 1962, discovery proceedings were in full swing before the Special Master pursuant to a schedule fixed by the Court prior to the time when the additional defendants became parties.

The counterclaims, as repeatedly asserted by Toolco itself, are based entirely on the proposition that the substantial injury which TWA concededly suffered in connection with the acquisition and financing of jet aircraft was the result of unlawful conduct on the part of the additional

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*The order of February 7, 1962, confirming Toolco's priority set forth a specific schedule which provided that all Toolco's depositions would be completed by April 19, 1962, and that TWA's deposition of Hughes was then to proceed (B-494, R-738).

defendants and not the result of any conduct by Toolco.* Thus, the principal issue presented by both the complaint and the counterclaims was simply to determine who caused the delays in the acquisition and financing of TWA's jet fleet: the defendants or the additional defendants. Hence, discovery by any party inevitably involved all parties.

As soon as the counterclaims were served, Toolco promptly gave notice to the additional defendants, pursuant to the direction of the Special Master, that depositions were then in progress (B-27). At the same time, the Special Master clearly stated his intention that the additional defendants would be held responsible for full participation in all of the discovery conducted by TWA or Toolco and that the additional defendants would be bound by all the rulings made by him and by the testimony developed at the depositions conducted by Toolco (R-7304—R-7306). Within days after the filing of the counterclaims, the Special Master granted motions by Toolco under Fed. R. Civ. P. 34 compelling the additional defendants to produce tens of thousands of documents immediately** (B-209).

Promptly after the filing of the counterclaims, the additional defendants sought a revision of the discovery schedule to comport with the changed circumstances. Thus, the additional defendants served notices to examine Toolco by Hughes, as managing agent (B-255, B-257, B-278, B-282), and motions for the production of documents by Toolco under Rule 34 (B-259, R-25250, R-25263, R-25276). On the strength of the chronological priority of those notices, the additional defendants then moved for pri-

*Thus, Toolco told the Court of Appeals that "the facts asserted in the counterclaims constitute affirmative defenses to the allegations of the complaint" (Toolco Br. in Ct. of App. p. 3).

**At the same time, the Special Master quashed the outstanding subpoenas which had been served on respondents.

ority of discovery with respect to the allegations of the counterclaims. The Special Master granted the Rule 34 motions on February 16, 1962 and ordered Toolco to produce the documents on March 15, 1962 in conjunction with the production to TWA previously ordered (R-6946, R-6951). As to oral depositions, however, the Special Master denied the requested priority* (R-6955). The additional defendants appealed that ruling to the District Court (R-934, R-938, R-944).

By order of March 5, 1962, the District Court partially granted the application of the additional defendants by modifying the deposition schedule in its previous order of February 7, 1962, to the following extent:

> "Defendant Hughes Tool Company may continue the depositions scheduled, limited, however, to evidence which bears on plaintiff's claims against Hughes Tool Company. . . . Upon completion of this phase of defendant's depositions, the plaintiff shall proceed with its depositions in the order provided in the pretrial order of February 7, 1962. *The additional defendants may participate in such depositions conducted by plaintiff, in furtherance of their own deposition proceedings, or may separately schedule such depositions to follow upon the completion of plaintiff's depositions.* At the conclusion of the deposition proceedings by the additional defendants, the defendant Hughes Tool Company may then resume and complete its deposition proceedings" (A-87) (Emphasis added).

The effect of that order was to leave intact the deposition notices served by the additional defendants, but to postpone the date for taking such depositions. Toolco

*It should be noted that neither at this time nor at any later time did Toolco challenge the notices as such.

thereafter enjoyed the exclusive right to conduct depositions for the remainder of 1962.*

Following the production of its documents to all parties on March 15, 1962, Toolco revealed that certain admittedly relevant documents had been withheld on the ground of attorney-client privilege. The additional defendants, joined by TWA, demonstrated to the satisfaction of the Special Master that Toolco had no right to claim the privilege because it had been deliberately waived in several affidavits and in Toolco's pleadings (A-95—A-115). The order of the Special Master requiring Toolco to produce those documents was affirmed by the District Court on July 24, 1962 (A-116); the documents were submitted to the Special Master for individual inspection by him (A-92—A-93); the Master again ordered that the documents be produced to all the parties (B-453); the Court again affirmed (A-92—A-93); and the Court of Appeals denied Toolco's mandamus petition to review the District Court's order (B-213).** Ultimately, on January 23, 1963, Toolco refused to comply with any of those orders (B-224—B-236) and specifically refused to produce the documents to the additional defendants although directly ordered to do so (B-232). This was Toolco's first deliberate default. It related to the production of essential documents and had nothing to do with the deposition of Hughes.

Meanwhile, on May 2, 1962, TWA had served interrogatories on Toolco designed to ascertain the whereabouts of Hughes in order to serve him with a witness subpoena

*During 1962, Toolco conducted depositions for a total of 80 days, consuming 10,000 pages of the record, but nevertheless examined just four witnesses, only two of whom were completed (A-117, R-5428—R-18168).

**Thus, petitioner's assertion that the facts demonstrate that it did not waive the attorney-client privilege (Pet. for Cert. App. D. p. 46a) is contrary to the findings made twice by the Special Master, twice by the District Court and affirmed by the Court of Appeals.

(R-1212, R-1220). Following objections by Toolco, the Special Master ordered Toolco to answer the interrogatories unless Hughes authorized some person in writing to accept service of the subpoena on his behalf. (R-9989—R-9990). After modification of the scope of the interrogatories, that order was affirmed by the District Court on July 12, 1962 (A-88).

On September 6, 1962, counsel for Toolco accepted service of a subpoena for Hughes returnable on September 24, 1962, at the United States District Court House in Los Angeles, California (B-216). On the same date, counsel for TWA submitted to the District Court the affidavit of a handwriting expert which claimed that the written authorization under which counsel had accepted the subpoena was a forgery (B-34, B-37).

On September 15, 1962, the additional defendants joined in an application by TWA to the Special Master to suspend the examination of TWA still being conducted by Toolco so that the deposition of Hughes could be commenced on September 24, 1962 (R-18265—R-18266). The Special Master denied that application, but held in part:

> "I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena . . . " (R-18269).
>
> * * *
>
> ". . . I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what I hope is clear notice of very substantial sanctions, not against Mr. Hughes, but against the Hughes

> Tool Company, in case there should be at some later date a claim of lack of authorization or failure to respond to the subpoena . . ."* (R-18353—R-18354).

On September 21, 1962, the District Court modified the order of the Special Master by setting the date of the Hughes deposition for October 29, 1962, but the Court affirmed the Special Master with respect to the relationship between Hughes and Toolco (B-46).

Toolco then began a series of maneuvers calculated to postpone as long as possible the scheduled examination of Hughes. On September 25, 1962, Toolco moved for a pre-trial conference under Fed. R. Civ. P. 16 for the alleged purpose of defining and narrowing the issues (R-1914). Early in October, Toolco served a series of massive interrogatories on TWA (R-27491, R-2214), which the Special Master ordered TWA to answer (A-93). TWA appealed that order to the District Court (A-93).

On October 25, 1962, Toolco again sought to adjourn the date for the examination of Hughes beyond October 29, 1962. Over objections by TWA and the additional defendants (B-498) the Special Master granted Toolco's application for adjournment (B-455). However, in response to the plea of the additional defendants, the Special Master set February 11, 1963, as a firm date for the Hughes examination, for the express purpose of giving Toolco "a reasonable time to present whatever motions it cared to to the Court . . ." (B-460). Although the Special Master speci-

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*On February 8, 1963, counsel for Toolco stated with respect to this decision of the Special Master ". . . the Tool Company did not seek a review of those rulings of the special master by the Court and accepted in effect the responsibility placed upon it by that ruling" (A-167).

fied that any appeal should be taken within ten days (R-18431), Toolco did not appeal from that order.

On December 4, 1962, Toolco brought on before the Special Master a motion to interpose the depositions of additional defendants Dillon Read, Sessel and Irving before the deposition of Hughes (B-503). The additional defendants opposed on the ground that the examination of Hughes by all parties should proceed as scheduled. On December 28, 1962, the Special Master rejected that maneuver by Toolco, stating "I am now denying the application and motion of the Tool Company to depose Mr. Sessel and the Irving Trust Company by Mr. Sessel, and Mr. Wadsworth and Dillon, Read & Company, Inc., at any time prior to taking of the deposition of Howard R. Hughes, which is to begin on February 11, 1963" (B-466). Toolco then appealed the Master's decision to the District Court.

The District Court's order of January 10, 1963, disposed of a number of Toolco's delaying motions:

1. It denied Toolco's motion to interpose the depositions of Sessel and Wadsworth prior to the deposition of Hughes and stated:

> ". . . The deposition of Howard R. Hughes by the plaintiff *and the additional defendants* should now go forward. This deposition was originally scheduled for September 24th, 1962 and then adjourned to October 29th, 1962. It has now been adjourned to February 11, 1963 and this date will be adhered to in the absence of extraordinary circumstances" (A-91) (Emphasis added).

2. It denied Toolco's Rule 16 motion, with leave to renew after the deposition of Hughes (A-92).

3. It permitted TWA to postpone answer to Toolco's interrogatories until after Hughes' deposition (A-93).

4. It affirmed for the second time the Special Master's ruling on Toolco's attorney-client documents and ordered such documents produced by noon on January 14, 1963 (A-92).

Following the District Court's order of January 10, 1963, Toolco undertook a variety of desperate stratagems, transparently designed to prevent or delay the Hughes deposition.

On January 14, 1963, Toolco served a motion either to take Hughes' deposition on written interrogatories or to bring on for hearing Toolco's motion, which had been pending since August 8, 1961, to dismiss TWA's complaint for lack of jurisdiction and for failure to state a claim for relief. By order of January 19, 1963, the District Court denied the motion to depose Hughes by written interrogatories and set a briefing schedule for the motion to dismiss the complaint (A-117). The Court further instructed Toolco to advise TWA *and the additional defendants* by noon on January 22, 1963, if it desired them to conduct the examination of Hughes at some location other than the Federal Court in Los Angeles (A-121). No such notice was given (B-229) and TWA and the additional defendants then undertook extensive preparation for the Hughes deposition in Los Angeles (B-210).

In the meantime the additional defendants, in connection with preparation for their examination of Hughes, had moved on January 9, 1963, for the production of certain additional documents by Toolco which would tend to establish that the delays in the acquisition and financing of TWA's jet fleet—the basic issue involved in both the com-

plaint and the counterclaims—were deliberately caused by Toolco and Hughes as part of a scheme to reap tax savings and other benefits, aggregating many millions of dollars, at TWA's expense (B-241—B-244, R-18804—R-18806, R-18819—R-18825, R-27351). In addition to certain tax returns, the requested documents included revenue agents' reports, accountants' work sheets and related memoranda for the years 1939-1962 (B-237—B-240).*

After extended argument (R-18781—R-18841), the Special Master specifically ruled on January 22, 1963 that good cause had been shown for the production of the documents requested, that they were relevant and that the burden of their production by Toolco was not unreasonable (B-245—B-247). He therefore ordered Toolco to produce those documents on January 30, 1963, so that counsel could be "fully informed by such material" in connection with the examination of Hughes (B-247).

By order of February 1, 1963, the District Court affirmed the Special Master and ordered production of the documents on a day-to-day basis commencing on February 1, 1963, such production to be completed by February 11, 1963 (A-143—A-144). No such documents were ever produced, although the additional defendants and TWA repeatedly demanded such production (A-196, B-177, B-248—B-251). This was Toolco's second deliberate default, and also related to documents.

Then, on February 6, 1963—three business days before the scheduled examination of Hughes—Toolco suddenly filed a complaint against the additional defendants before

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*Petitioner's assertion that "only the tax returns and financial statements for the years 1961 and 1962" were at issue (Pet. for Cert. App. D. p. 46a; see also Pet. for Cert. pp. 9-10) is an obvious and puzzling misstatement. As Toolco well knows, those items comprised only two of *twenty-three* separate categories of documents which Toolco was ordered to produce (B-237—B-240).

the CAB (A-145). On the basis of that complaint, Toolco then, incredibly, moved in the District Court for an order staying all proceedings on its own counterclaims (A-263). Toolco's motion was denied by the District Court on February 8, 1963 (A-195, R-3799).

Also on February 6, 1963, the District Court denied Toolco's motion to dismiss TWA's complaint (B-391, B-180). The Court, at Toolco's request, also stayed all discovery proceedings until 5 p.m. on February 8, 1963 to permit Toolco to apply to the Court of Appeals for a stay and for review by mandamus or otherwise (B-192). However, Toolco made no such application (A-170).

On February 8, 1963, the last business day before the examination of Hughes scheduled for February 11, Toolco's counsel announced to the District Court that Toolco had made a "business decision" not to permit *any* further discovery (A-173). Counsel further stated that Toolco was aware of the sanctions which could be imposed for such refusal to make discovery (A-167).

At that time the District Court carefully recited to Toolco's counsel the state of the record, including the following with respect to the posture of the counterclaims:

> "I want to point out to you, Mr. Davis, that Mr. Hughes' appearance on February 11th was not solely in conjunction with the deposition to be conducted by TWA but was also in conjunction with the counterclaims which you have asserted against TWA and the additional defendants; that notices to take that deposition were properly served; that the Court fixed an order of priority of deposition and indicated when the deposition of Mr. Hughes would go forward in so far as the additional defendants were concerned, and that was reiterated in the pretrial order of this Court on January 10th.

> So that if Mr. Hughes is not appearing—and even if he does appear, as far as we are concerned in this litigation, he has not appeared, on your concession—then the appearance is in default and in violation of the notices and the prior orders of this Court" (A-196).

Toolco nevertheless refused to produce Hughes. This was Toolco's third deliberate default and included a refusal to make any further discovery.

Following the defaults outlined above, TWA moved for a default judgment on its complaint (R-4970) and both TWA and the additional defendants moved on February 15, 1963 for dismissal of the counterclaims with prejudice, based upon Toolco's wilful and deliberate refusal to comply with orders of the District Court (R-4970, B-205). As noted above those motions were granted by the District Court on May 3, 1963.

The Court of Appeals affirmed, stating in part:

> "Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put to much delay and expense—that the defendants made a 'business decision' to terminate discovery.

> "Hughes' conduct is particularly intolerable in a large and complex litigation such as this one. The protracted antitrust suit taxes the energies and resourcefulness of each party to the litigation; and it consumes much time of the court and the special masters it appoints. Tactics such as Hughes' serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation. . . .
>
> "In the light of all these circumstances, the district court was not obliged to employ sanctions less severe than the dismissal of the counterclaims with prejudice" (Pet. for Cert. App. B p. 29a).

It may also be noted that during oral argument before the Court of Appeals, counsel for Toolco was specifically asked whether he could assure the Court that Hughes would appear for his deposition "if we reverse conditioned upon Mr. Hughes' appearance within a reasonable time." Counsel for Toolco refused to make any such commitment (Tr. of Oral Argument, Nov. 13, 1963, pp. 41, 51).

Argument

I

DISMISSAL OF THE COUNTERCLAIMS FOR PETITIONER'S WILFUL REFUSAL TO COMPLY WITH DISCOVERY ORDERS IS CONSISTENT WITH DUE PROCESS OF LAW

The power of the District Court to dismiss a complaint or counterclaim for its proponent's wilful failure to comply with discovery orders is derived from the explicit language of Fed. R. Civ. P. 37 (quoted at Pet. for Cert. App. C pp. 38a-39a). *Societe Internationale* v. *Rogers*, 357 U. S.

197 (1958). Rule 37 enables the District Court to secure compliance with and thereby effectuate the discovery provisions of the Federal Rules. It vests the District Court with authority to impose a broad array of sanctions for violations of discovery orders. In applying those sanctions a district judge, particularly one assigned to a case for all purposes, is vested with broad discretion, within the bounds of the rule, to make whatever disposition is just on the facts and circumstances of the case before him.

Dismissal of an action for wilful failure to comply with discovery orders of the court does not violate due process of law. *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322 (1909); *Societe Internationale* v. *Rogers, supra; Nasser* v. *Isthmian Lines,* 331 F. 2d 124 (2d Cir. 1964). See *Link* v. *Wabash Railroad Co.,* 370 U. S. 626 (1962); *Costello* v. *United States,* 365 U. S. 265, 286-87 (1961). Due process is secured by the valid presumption of fact created by the lawmaking power that the refusal to produce material evidence is an admission of the want of merit in the asserted claim. *Hammond Packing Co.* v. *Arkansas, supra; Societe Internationale* v. *Rogers, supra; Nasser* v. *Isthmian Lines, supra.*

Petitioner asserts that the adverse presumption may not be applied to it and that due process has been violated because its refusal to submit to discovery was based, not on the counterclaims' lack of merit, but on its belief that the decision of this Court in *Pan American World Airways, Inc.* v. *United States,* 371 U. S. 296 (1963) (*Panagra*) required it to obtain a determination by the CAB before it could prosecute its counterclaims. It should be noted, however, that Toolco's motion for a stay on the basis of *Panagra* was made (a) almost one year after Toolco itself had brought in these respondents as additional de-

fendants to counterclaims seeking over $366,000,000, (b) after extensive discovery proceedings had already been conducted in the action and numerous pretrial conferences held, and (c) at a time when Toolco had *already* defied court orders requiring the production of allegedly privileged documents by January 23, 1963. In addition, as demonstrated in Point III *infra*, Toolco's alleged reliance on that decision was wholly misplaced.

Moreover, the argument that refusal to submit to discovery may not constitutionally result in a dismissal of claims or a default judgment if the refusal was based on factors other than admitted lack of merit was rejected by this Court in *Hammond Packing Co. v. Arkansas, supra*, and is wholly without substance. In that case the petitioner refused to obey the mandate of an Arkansas court ordering it to produce certain witnesses for oral examination and books and records for inspection on the grounds that the court lacked power to enter the order and that the order was unconstitutional. The trial court thereupon entered a default judgment and the Arkansas Supreme Court affirmed. In this Court the petitioner argued *inter alia* that the discovery order was unconstitutional and that the entry of the default judgment for its failure to comply therewith constituted a taking of property without due process of law.

This Court affirmed the default judgment, holding that due process was secured by the presumption that the refusal to produce material evidence was but an admission of the want of merit in the asserted defense. With respect to petitioner's argument that its refusal to comply with the discovery order was predicated on its belief that the order was unconstitutional, this Court stated:

> "As the Hammond Company absolutely declined to obey the order and stood upon what it deemed

> to be its lawful rights and privileges, even if that course of conduct was taken because of a contrary conception as to the meaning of the statute, it is not within our province to afford relief because of an error of judgment in this respect" (212 U. S. at 347).

Similarly, petitioner's election to "rest on the merits of its positions" (B-178) does not excuse its refusal to obey the orders of the District Court and does not render the presumption of lack of merit inapplicable or create any constitutional issues with respect to the dismissal of the counterclaims.

Furthermore, as the Court of Appeals found, Toolco's refusal to comply with the Court's discovery orders was but a tactic designed "to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation" (Pet. for Cert. App. B p. 29a).

Toolco has flagrantly distorted the record below in an attempt to obliterate the procedural context in which the dismissal with prejudice was granted. Thus, Toolco asserts in its petition that (1) the District Court never made a "clear ruling" as to whether the additional defendants had the right to depose Hughes on February 11, 1963 (Pet. for Cert. p. 19), (2) the Court of Appeals in affirming the dismissal relied on Toolco's conduct in discovery relating to the complaint, not to the counterclaims (Pet. for Cert. p. 18), (3) the District Court did not make any findings as to the materiality of the information sought to be obtained from Hughes (Pet. for Cert. p. 20), (4) the District Court made no findings, and there was no showing in the record, "that the evidence . . . sought by . . . other discovery was

relevant or material to the preparation of a defense to petitioner's counterclaims" (Pet. for Cert. pp. 3-4) and (5) default judgment was entered without consideration of the appropriateness of permitting a voluntary dismissal (Pet. for Cert. pp. 21-22), and that by reason of the foregoing the dismissal of the counterclaims violated due process of law. Each of those contentions of petitioner is entirely erroneous.

(1) As to Toolco's statement that the District Court never made a clear ruling that the additional defendants had the right to depose Hughes on February 11, 1963, the facts are that the Special Master on October 25, 1962 (B-460) and the District Court on January 10, 1963 (A-91) and on February 8, 1963 (A-196) specifically and clearly ruled that Hughes was to be deposed by the additional defendants on February 11, 1963. As the Court of Appeals expressly noted, "the additional defendants had the right under Judge Metzner's order to treat as their own the Hughes deposition scheduled for February 11, and it is abundantly clear from the record that they did so" (Pet. for Cert. App. B p. 28a).

(2) As to Toolco's contention that its conduct in refusing to make discovery related to the complaint and not to the counterclaims, the facts are, in so far as the examination of Hughes is concerned, set forth in the preceding paragraph. As to the two categories of documents which Toolco was ordered to produce, in each case counsel for the additional defendants made motions to require Toolco to produce those documents (B-259, B-237), and in each case Toolco was specifically ordered by the Special Master (A-95, B-453, B-232, B-237) and by the Court (A-116, A-92, A-144) to produce the two categories of documents for the additional defendants, and in each case Toolco specifically refused to produce those documents for the additional defendants (B-224, B-232, B-248).

(3) Toolco's contention that the District Court did not make any finding as to the materiality of the information sought to be obtained from Hughes is equally misleading. In making that argument, Toolco ignores the express findings of the District Court in its opinion of May 3, 1963* (Pet. for Cert. App. B pp. 4a-5a). Those findings were made specifically applicable to the counterclaims by the District Court's contemporaneous order which dismissed the counterclaims "for all the reasons stated in the opinion and order entered on the companion motion by Trans World Airlines" (A-206). Obviously it was not necessary for the Court to duplicate its findings, particularly since the factual issues underlying the complaint and the counterclaims were concededly identical. It is significant that the

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*Thus, contrary to petitioner's assertion, the decision of the Court of Appeals for the District of Columbia Circuit in *Von Der Heydt* v. *Rogers*, 251 F. 2d 17 (D. C. Cir. 1958) and the decision of the Court of Appeals in the case at bar are not in conflict. In *Von Der Heydt* v. *Rogers*, the District Court had dismissed a complaint for the plaintiff's failure to produce certain books and records. Before ruling on the motion to dismiss, the District Judge heard testimony on the issues of the materiality of the records sought, the possession and control of the records by plaintiff and plaintiff's actions constituting refusal to produce. The Court of Appeals found that on the facts and record before it, it could not afford adequate appellate review and remanded the case to the District Court for further findings. Judge Burger in his concurring opinion pointed out that there is no rigid formula for findings with respect to such a dismissal and that "what is desirable for one case does not fit another." On remand, the District Court made further findings and in *Von Der Heydt* v. *Kennedy*, 299 F. 2d 459 (D. C. Cir.), *cert. denied*, 370 U. S. 916 (1962), the Court of Appeals affirmed the dismissal.

Unlike *Von Der Heydt* v. *Kennedy*, the District Court here was faced not merely with a refusal to produce documents but also with the refusal of Howard Hughes to appear for his deposition and the refusal on the part of petitioner to proceed any further with discovery. Under these circumstances, the District Court's findings were clearly correct and as the Court of Appeals evidently concluded allowed for adequate appellate review.

Court of Appeals, faced with this same contention by Toolco, found that "the deposition of Hughes was necessary to all aspects of this litigation" and that "Hughes' deposition was absolutely essential to the proper conduct of the litigation" (Pet. for Cert. App. B pp. 28a, 29a).

(4) Toolco's contention that there was no showing in the record, and no findings, as to the relevance and materiality of the documents which it refused to produce is also clearly and obviously incorrect. As has already been noted, both the District Court and the Special Master specifically ruled that the allegedly privileged documents, which were examined by the Special Master, and the documents relating to tax matters, which were discussed in detail by the Special Master, were subject to production under Rule 34, and the Court of Appeals specifically affirmed those rulings (Pet. for Cert. App. B p. 30a). Moreover, there was no dispute that the documents were under Toolco's exclusive possession and control. *Cf. Societe Internationale* v. *Rogers*, *supra*.

(5) Finally, Toolco's contention that due process was violated because the counterclaims were dismissed with prejudice without consideration by the Court of the appropriateness of permitting a voluntary dismissal of the counterclaims is also patently without substance. As the Court of Appeals found:

> ". . . at no juncture in the proceedings below did the defendants [Toolco] request that the court grant such relief. Indeed, the very purpose for the defendants' 'business decision' to terminate all pretrial discovery was to gain judicial review of the positions which the defendants had taken below" (Pet. for Cert. App. B p. 27a).

In addition, it should be noted that Toolco expressly told the District Court three times that it was not seeking a voluntary dismissal (A-174, R-5022, R-5129).

Moreover, even if Toolco had moved under Rule 41 for a voluntary dismissal, it would have been denied because the granting thereof would have seriously prejudiced the additional defendants. To draw this Court's attention away from that fact, Toolco has taken the position that "the additional defendants had in no respect been burdened or prejudiced by reason of the pendency of the counterclaims, except to the extent that the necessity of filing a reply to a pleading constitutes a burden" (Pet. for Cert. p. 23).

To the contrary, petitioner is well aware that the additional defendants expended a great deal of time and many hundreds of thousands of dollars in defense of counterclaims asserted by Toolco against them (B-209). Numerous motions were made by all parties and decided by the Special Master and the District Court. Over a million pages of documents were produced for inspection and copying by all parties (B-210). The additional defendants participated for almost a year in pre-trial proceedings and made extensive preparations both for depositions and trial (B-210). In that context, granting any motion for a voluntary dismissal would have been an abuse of discretion.

In support of its position that the counterclaims did not burden the additional defendants, Toolco has made the preposterous assertion that "the attendance by the additional defendants at the deposition being conducted by Toolco of TWA on the issues of the complaint was voluntary" (Pet. for Cert. p. 10). As Toolco well knows, the Special Master repeatedly made clear that "I expected these additional defendants and parties, whether they attended or not, to be bound by these depositions" and "I have imposed upon them

the responsibility of watching out for their clients' interests as to testimony that may be adduced as this case goes along" (R-12924). Moreover, at the insistence of Toolco itself (B-32), the additional defendants were required by the Court to pay two-thirds of the Special Master's fee for his services in connection with the "deposition being conducted by Toolco of TWA," as to which Toolco now says the attendance of the additional defendants was "voluntary".

II.

DISMISSAL OF THE COUNTERCLAIMS FOR PETITIONER'S WILFUL REFUSAL TO COMPLY WITH DISCOVERY ORDERS WAS REQUIRED BY THE ACCEPTED COURSE OF JUDICIAL PROCEDURE

As a result of Toolco's (1) refusal to produce Hughes, (2) refusal to produce the so-called privileged documents, (3) refusal to produce the tax documents and (4) refusal to submit to any further discovery, the District Court dismissed the counterclaims with prejudice. The Court of Appeals affirmed. In so doing the courts below were following settled principles laid down by this Court and consistently applied by the lower courts. See *Hammond Packing Co.* v. *Arkansas, supra; Von Der Heydt* v. *Kennedy, supra; Fischer* v. *Dover Steamship Co.*, 218 F. 2d 682 (2d Cir. 1955); *Bourgeois* v. *El Paso Natural Gas Co.*, 257 F. 2d 807 (2d Cir. 1958); *First Iowa Hydro Elec. Cooperative* v. *Iowa-Illinois Gas & Elec. Co.*, 245 F. 2d 613 (8th Cir.), *cert. denied*, 355 U. S. 871 (1957); *Hubbard* v. *B. & O. R. R.*, 249 F. 2d 885 (6th Cir. 1957); *Mooney* v. *Central Motor Lines*, 222 F. 2d 569 (6th Cir. 1955); *Delphy* v. *Bernuth, Lembcke Co.*, 217 F. 2d 301 (2d Cir. 1954);

Peitzman v. City of Illmo, 141 F. 2d 956 (8th Cir.), *cert. denied,* 323 U. S. 718 (1944); *Collins v. Wayland,* 139 F. 2d 677 (9th Cir.), *cert. denied,* 322 U. S. 744 (1944).

It is merely captious to argue that, faced with Toolco's adamant refusal to make any further discovery, the District Court should have fashioned some sanction other than the dismissal of the counterclaims. The Court of Appeals found the sanction to be "fully justified" (Pet. for Cert. App. B p. 28a). Indeed, no sanction other than dismissal or its equivalent, *i.e.,* the entry of an order prohibiting Toolco from supporting its claims, would have been adequate.

III.

TOOLCO'S MOTION FOR A STAY WAS PROPERLY DENIED BY THE DISTRICT COURT AS COMPLETELY WITHOUT MERIT, AND PRESENTS NO ISSUES WHICH THIS COURT OUGHT TO REVIEW

As already noted, on February 6, 1963, or three business days before the crucial examination of Hughes was to commence pursuant to court order on February 11, Toolco filed a complaint with the CAB alleging that some of the additional defendants had violated certain provisions of the Federal Aviation Act (A-145). Toolco then raced back to the District Court and, on the same day, moved for an order staying "all further proceedings [by any of the additional defendants] with respect to [any of] the counterclaims . . . pending the entering of a final order by the Civil Aeronautics Board with respect to" the Toolco complaint (A-263).

The alleged basis of Toolco's motion, which it reiterates in its present petition, was that, as a result of the decision

of this Court in *Panagra*, the CAB had acquired "primary jurisdiction over the counterclaims," and accordingly a stay was necessary until there was a determination by the CAB "that the conduct of the additional defendants was inconsistent with the public interest" (Pet. for Cert. pp. 15, 12). Toolco argued that, if, contrary to its contentions, the CAB should find that conduct consistent with the public interest, the result would be to "exempt that conduct from the operation of the antitrust laws" and thus give the additional defendants a defense to the counterclaims (Pet. for Cert. pp. 17-18).

We submit that it is absurd on its face for a litigant to come to court a year after filing its claims, and insist upon a stay over defendants' objections, on the ground that it has commenced another proceeding in another forum, the unsuccessful outcome of which will provide its adversaries with a complete defense. As the District Court put it, Toolco was seeking a chance to go "down to Washington to see if what we claim is wrong is really all right" (A-178). Finding no merit whatsoever in this extraordinary eleventh hour effort of Toolco to stay a judicial determination of its own counterclaims, the District Court denied the motion, which was immediately followed by Toolco's refusal to produce Hughes.

A motion for a stay is, of course, addressed to the sound discretion of the court, "which must weigh competing interests and maintain an even balance," and which must also consider whether "there is even a fair possibility that the stay for which [the litigant] prays will work damage to some one else." *Landis* v. *North American Co.*, 299 U. S. 248, 254-55 (1936). Surely this Court would not wish to review the exercise of discretion by the trial court in deny-

ing Toolco the belated relief which it sought a year after it itself had initiated an incredibly expensive and time-consuming litigation against these respondents, and on the eve of the long-awaited Hughes deposition, which these respondents believed would establish the complete lack of merit in Toolco's charges.

In any event, as found by the Court of Appeals, Toolco's motion was based upon such an obvious misreading of *Panagra* that there can be no question as to the correctness of the lower court's ruling. In *Panagra,* the issue was whether the CAB, in regulating the aeronautics industry under the Federal Aviation Act, or the Department of Justice, in discharging its responsibilities under the anti-trust laws, was the proper government agency to deal with problems lying "within the purview of the Board," such as "questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers." The Court noted that "while the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it encompass only a fraction of the total." The Court concluded, however, that in *Panagra* action by the CAB was appropriate because "the acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority" and "are basic in this regulatory scheme" encompassed by the Federal Aviation Act. See 371 U. S. at 305, 312.

It is readily apparent from the nature of Toolco's counterclaims (A-40—A-84), which were summarized by the Court of Appeals in its opinion (Pet. for Cert. App B pp. 25a-26a), that they do not conceivably fall within the "fraction of the total" of antitrust problems entrusted to the CAB, and that they do not, in any sense, constitute "precise ingredients" of the Board's regulatory authority.

Those counterclaims—seeking $366,000,000 in damages—are directed, not against air carriers, but against a group of financial institutions and their officers. They allege common law claims, such as interference with contract rights (A-48—A-49), breach of fiduciary duty (A-48—A-49) and conspiracy to inflict a malicious injury on Toolco (A-78), and such garden-variety antitrust claims as price-fixing (A-55), allocation of customers (A-55), boycott (A-55) and conspiracy to monopolize the supplying of financing to air carriers (A-54—A-55). There can be no quarrel whatsoever with the conclusion of the Court of Appeals that these charges "fall beyond the scope of the CAB's exclusive jurisdiction," as "they deal with alleged misconduct on the part of the lending institutions in their dealings with TWA and Toolco and in no respect with matters specifically entrusted to the Board in the Act" (Pet. for Cert. App. B p. 26a). Clearly the intervention of the CAB was not necessary here in order to obtain "uniformity and consistency in the regulation of business" by an agency with "specialized competence." See *Far East Conference* v. *United States*, 342 U. S. 570, 574 (1952).

One of Toolco's five counterclaims alleged that two of the additional defendants—Metropolitan and Equitable—were persons engaged in a phase of aeronautics who had acquired control of TWA without CAB approval, in violation of Section 408 of the Federal Aviation Act. As to that counterclaim the Court of Appeals ruled that "the Board clearly possesses exclusive jurisdiction" and thus the counterclaim should have been dismissed by the District Court for lack of jurisdiction (Pet. for Cert. App. B p. 26a). Toolco's argument (Pet. for Cert. p. 24) that the Court of Appeals should have ordered the District Court to "hold in abeyance" the second counterclaim over which

it had no jurisdiction is sophistry. However proper it might be for a court to hold a claim in abeyance where it finds that an agency has *primary* jurisdiction, the Court of Appeals here found that the CAB had *exclusive* jurisdiction and thus there was no alternative to dismissal. Moreover, even assuming *arguendo* that a stay of the second counterclaim was proper, Toolco asked for a stay of *all* proceedings with respect to *all* its counterclaims, even though the other four had nothing whatsoever to do with the Federal Aviation Act.

Thus Toolco's motion for a stay presented no more than a desperate and meritless last-ditch effort to avoid compliance with discovery orders, and is not worthy of the consideration of this Court.

CONCLUSION

This case received the most careful consideration by both the District Court and the Court of Appeals. Upon the basis of a thorough review of the record herein, the Court of Appeals, in affirming the District Court, unanimously concluded that the dismissal of the counterclaims with prejudice was fully justified and constituted "the inevitable consequence of Toolco's default in producing Hughes as a witness and in producing the documents as the court had directed" (Pet. for Cert. App. B p. 25a). Toolco's contentions that this remedy was constitutionally and otherwise improper are based upon such gross distortions of the record and such unsound contentions of law as to make this case completely inappropriate for review

by this Court. Accordingly, we submit that a writ of certiorari should be denied.

Respectfully submitted,

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